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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 JONATHON PERRY-HUDSON,

18 Plaintiff,

19 v.

20 TWILIO, INC.,

21 Defendant.

Case No. 3:24-CV-03741-VC

**REPLY IN SUPPORT OF DEFENDANT
TWILIO INC.'S MOTION TO COMPEL
INDIVIDUAL ARBITRATION**

Pursuant to Fed. Arb. Act., 9 U.S.C. § 4.

Date: October 31, 2024

Time: 10:00 a.m.

Courtroom: 4 — 17th Floor

Judge: Hon. Vince Chhabria

Date Filed: June 21, 2024

Trial Date: Not Yet Set

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I. INTRODUCTION

In his opposition, Plaintiff does not dispute that he tactically sued Twilio—and not Keeps, whose website and data policies are fundamental to his claims here—to avoid arbitration on an individual basis under New York law, as his arbitration agreement with Keeps validly requires. *See* Dkt. No. 24 (“Opp.”); *see also* Dkt. No. 15–1 (“Kanig Decl.”) ¶ 5 & Ex. D ¶¶ 16–18 (Keeps Terms). At the same time, Plaintiff also does not dispute that the doctrine of “[e]quitable estoppel prevents [signatory plaintiffs] from sidestepping [arbitration] agreement[s] by bringing claims only against [related nonsignatories] instead.” *See Young v. ByteDance Inc.*, 700 F. Supp. 3d 808, 814, (N.D. Cal. 2023). Yet Plaintiff opposes Twilio’s motion to compel his claims to individual arbitration on equitable estoppel grounds, but only by ignoring Twilio’s evidence and the law.

First, Plaintiff falsely contends that Twilio has “done nothing to meet its burden” to prove he agreed to the Keeps Terms containing the arbitration provision. Opp. at 4. In doing so, he ignores the sworn declaration from Keeps’s General Counsel attesting that he was presented with and necessarily agreed to the Keeps Terms when using and making his purchase on the Keeps website. *See* Dkt. No. 15–7 (“Jahn Decl.”) ¶¶ 2–3. Plaintiff argues in boilerplate that Keeps’s declaration was insufficient evidence but fails to rebut it with any evidence of his own; not even a declaration of his own disputing that he agreed to the Keeps Terms. This is simply not enough to rebut Twilio’s sworn evidence or to put the existence of his agreement genuinely in dispute. The evidence is undisputed that Plaintiff agreed to the Keeps arbitration agreement.

Second, Plaintiff contends that the Keeps arbitration agreement does not cover his claims about Keeps’s collection and disclosure of health information he provided to its website. Opp. at 11–13. This argument is frivolous. The arbitration agreement expressly covers “[a]ny dispute, claim, or controversy arising out of or relating in any way to these Terms . . . or your use of the [Keeps] Site.” Kanig Decl. ¶ 5 & Ex. D ¶ 17. Plainly, this provision covers Plaintiff’s claims, which both arise out of and relate to his use of the Keeps website. *See* Compl. ¶¶ 5–7. To the extent that Plaintiff is arguing that arbitration agreements cannot validly cover statutory and other noncontractual claims, that position was roundly rejected by the U.S. Supreme Court almost 40 years ago. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

1 **Finally**, Plaintiff’s remaining arguments against the application of equitable estoppel are
 2 all wrong as a matter of law. Signatory plaintiffs are not permitted “to avoid arbitration by suing
 3 nonsignatory defendants for claims that are based on the same facts and are inherently inseparable
 4 from arbitrable claims against signatory defendants.” *Franklin v. Cmty. Reg’l Med. Ctr.*, 998
 5 F.3d 867, 870–71 (9th Cir. 2021). Yet that is precisely what Plaintiff did when he filed this suit
 6 against Twilio instead of Keeps. Plaintiff’s privacy claims against Twilio are (1) “intimately
 7 founded in and intertwined with” the Keeps Privacy Policy, which is incorporated by reference
 8 into the Keeps Terms, and (2) he “alleges substantially interdependent and concerted misconduct”
 9 between Keeps and Twilio that cannot be resolved without looking to the Keeps Privacy Policy.
 10 *See Herrera v. Cathay Pac. Airways Ltd.*, 104 F.4th 702, 708 (9th Cir. 2024) (citing *Goldman v.*
 11 *KPMG, LLP*, 173 Cal. App. 4th 209, 221 (2009)). Either of these circumstances is independently
 12 sufficient to invoke the doctrine of equitable estoppel, but both are present in this case.

13 This Court should compel Plaintiff’s claims to individual arbitration and stay this case.

14 **II. ARGUMENT**

15 **A. The evidence is undisputed that Plaintiff agreed to the Keeps Terms, 16 including its arbitration provision, class waiver, and choice of law.**

17 The evidence is undisputed that Plaintiff agreed to arbitrate any claim relating to the
 18 Keeps Terms and his use of the Keeps website on an individual basis under New York law. *See*
 19 MTCA at 7–8. Twilio submitted a sworn declaration from Keeps’s General Counsel attesting that
 20 Plaintiff was “presented with and required to agree to the Keeps Terms” when he created a Keeps
 21 account in May 2024. Jahn Decl. ¶ 2; *see also* Kanig Decl., Exs. D–E (relevant versions of the
 22 Keeps Terms). This evidence shows that “when he created his account on the Keeps website, he
 23 necessarily agreed to that arbitration provision and class action waiver.” *Id.* ¶ 3.

24 In opposition, Plaintiff submitted no evidence—not even a self-serving declaration—to
 25 rebut Twilio’s evidence that he entered into this arbitration agreement with Keeps. He does not
 26 deny that he was presented with the Keeps Terms when he created his Keeps account. Instead of
 27 presenting evidence, he baldly argues only that Twilio’s evidence is not sufficient. But, to do so,
 28 he simply *ignores* the Jahn Declaration, which provides the evidence he contends does not exist.

1 The law is clear that Plaintiff’s “metaphysical doubt” is insufficient to genuinely dispute
 2 Twilio’s evidence of the agreement. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
 3 U.S. 574, 586 (1986). “When deciding whether the parties agreed to arbitrate a certain matter,”
 4 courts “should apply ordinary state-law principles that govern the formation of contracts.” *First*
 5 *Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under California law, “[w]here
 6 the existence of a contract is at issue and the evidence is conflicting or admits of more than one
 7 inference, it is for the trier of fact to determine whether the contract actually existed. But if the
 8 material facts are certain or undisputed, the existence of a contract is a question for the court to
 9 decide.” *Bustamante v. Intuit, Inc.*, 141 Cal. App. 4th 199, 208 (2006). The undisputed evidence
 10 demonstrates that Plaintiff agreed to arbitration with Keeps when he created his Keeps account.
 11 By merely claiming that this evidence is insufficient, Plaintiff is demanding an inference be
 12 drawn that there was some unspecified defect in contract formation. But in this context, “facts
 13 must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’
 14 dispute as to those facts,” and his failure to even *deny* via a sworn statement that he agreed to
 15 arbitrate with Keeps, let alone present any supporting evidence, is insufficient to show a genuine
 16 dispute about the existence of the agreement. *See Scott v. Harris*, 550 U.S. 372, 380 (2007); *see*
 17 *also Hansen v. LMB Mortg. Servs., Inc.*, 1 F.4th 667, 672 (9th Cir. 2021) (summary-judgment
 18 framework governs genuine disputes about the existence of an arbitration agreement).

19 *Hoang v. Citibank*, a decision from another court in this District, is illustrative. *See* 702 F.
 20 Supp. 3d 864, 873 (N.D. Cal. 2023). There, the defendant bank moved to compel arbitration
 21 based on an arbitration provision in the client manual that it provides to all customers when they
 22 open a bank account. *Id.* at 867–68. In opposition, the plaintiff argued that the bank had not met
 23 its burden of proving that she saw the client manual and submitted a declaration attesting that she
 24 did not “remember the process of opening the account” or whether the bank had given her any
 25 documents, and did “not have any such documents in her possession.” *Id.* The court held that the
 26 plaintiff had “reasonably disputed” the existence of the arbitration agreement. *Id.* at 871–72. But
 27 at the same time, it could not “conclude as a matter of law that no agreement to arbitrate was
 28 entered,” “[e]ven drawing all inferences in [the plaintiff’s] favor,” because “it remains possible (if

1 not adequately proven) that [the bank] might have provided [the plaintiff] a copy of the Client
 2 Manual when she opened her account.” *Id.* Here, Plaintiff has not “reasonably disputed” that he
 3 was presented with the Keeps Terms by even baldly denying it, let alone with a declaration.

4 For the avoidance of any doubt, Plaintiff was presented with and agreed to the Keeps
 5 Terms when he created his Keeps account in the form of a standard, enforceable “sign-in wrap”
 6 agreement. *See* Reply Decl. of Ian Kanig (“Kanig Reply Decl.”), Ex. F; *see also* *Peter v.*
 7 *DoorDash, Inc.*, 445 F. Supp. 3d 580, 586 (N.D. Cal. 2020) (citing *Meyer v. Uber Techs., Inc.*,
 8 868 F.3d 66, 76 (2d Cir. 2017) (holding that sign-in wrap agreements are found “valid where the
 9 existence of the terms was reasonably communicated to the user”)). Keeps prompted Plaintiff to
 10 enter his name and email and click a “CONTINUE” button to begin the account creation process.
 11 Beneath that button, Keeps informed Plaintiff that, “By continuing, you agree to accept our Terms
 12 & Conditions and Privacy Policy.” Kanig Reply Decl., Ex. F. The “Terms & Conditions” and
 13 “Privacy Policy” language are conspicuously underlined hyperlinks on an otherwise blank white
 14 part of the page that put Plaintiff on inquiry notice of these terms. Indeed, a materially-identical
 15 version of this screen exists on the Keeps website today. Kanig Reply Decl., Ex. G. This sign-in
 16 wrap agreement is confirmed by the Keeps Terms, which provides, “By clicking ‘accept’ or
 17 otherwise using the Service, you acknowledge that you have read, understand, and accept all
 18 terms and conditions contained within these Terms[.]” Kanig Decl., Ex. D ¶ 1.

19 Plaintiff’s improper request for arbitration discovery in the event that he does not prevail
 20 on this issue should be denied. *Opp.* at 13–14. Arbitration discovery is warranted only if “the
 21 making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in
 22 issue.” *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999). And a party waives any
 23 right to such discovery by belatedly asking the court to order discovery on the condition that he
 24 does not prevail. *Wilson v. Huuuge, Inc.*, 944 F.3d 1212, 1220 (9th Cir. 2019). Here, Plaintiff
 25 does not allege any specific defect in his necessary agreement to the Keeps Terms could warrant
 26 discovery, *see Simula*, 175 F.3d at 726, and he has in any case waived any right to seek discovery
 27 by asking for discovery on the condition that he does not prevail, *Wilson*, 944 F.3d at 1220. This
 28

1 Court is thus left with an uncontested record showing that Plaintiff agreed to the Keeps Terms.¹

2 **B. The scope of Plaintiff’s arbitration agreement, which includes any dispute**
 3 **relating to his use of the Keeps website, covers his claims in this action.**

4 Plaintiff’s argument that the arbitration provision in the Keeps Terms does not cover his
 5 privacy claims that arise out of his use of the Keeps website is frivolous. *See* Opp. at 11–13. To
 6 determine whether a party’s claims fall within the scope of an arbitration provision, courts look to
 7 its plain language. *Franklin*, 998 F.3d at 872. The arbitration provision in the Keeps Terms
 8 covers “[a]ny dispute, claim, or controversy arising out of or relating in any way to these Terms;
 9 the . . . enforcement, interpretation or validity thereof; . . . or your use of the [Keeps] Site,
 10 including products purchased or Service rendered through the Site[.]” Kanig Decl., Ex. D ¶ 17.
 11 Plaintiff’s claims concern his use of the Keeps website to answer a questionnaire and then make a
 12 purchase, and Keeps’s alleged improper sharing of that personal information with Twilio (as
 13 governed by the Keeps Terms and Keeps Privacy Policy). Compl. ¶¶ 3–7; *see also* MTD at 4–6.
 14 There can be no dispute that Plaintiff’s claims about his use of the Keeps website thus arise out
 15 of—or at least relate to—his use of the Keeps website. *See, e.g., La Force v. GoSmith, Inc.*, No.
 16 17-CV-05101-YGR, 2017 WL 9938681, at *1 (N.D. Cal. Dec. 12, 2017) (enforcing a provision
 17 covering “any claim” “relating to” “in any way the Agreement or use of the Website”).

18 Further, the Keeps Privacy Policy, which is expressly incorporated into the Keeps Terms
 19 (as discussed below in additional detail), governs Keeps’s right to share this customer data with
 20 third-party software service providers like Twilio for marketing and advertising purposes. Kanig
 21 Decl., Ex. A ¶¶ 3, 7–8; *see also* MTD at 4–5. For that reason, Plaintiff’s claims also plainly arise
 22 out of—or at least relate to—the “interpretation” of the Keeps Terms. *Id.*, Ex. D ¶ 17. *See*
 23 *Tracer Research Corp. v. Nat’l Envtl. Servs. Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994) (a claim
 24 “arising out of” a contract “relat[es] to the interpretation and performance of the contract”).

25 Plaintiff’s citation to *Jackson v. Amazon.com* is inapposite. *See* 65 F.4th 1093, 1095–96
 26 (9th Cir. 2023). In that case, the plaintiff, who worked as a delivery driver for Amazon, alleged

27 ¹ Should this Court determine that there is a genuine dispute of material fact as to the “the making
 28 of the arbitration agreement,” the parties should “summarily proceed” to trial on that issue. *See* 9
 U.S.C. § 4; *Hoang*, 702 F. Supp. 3d at 873 (ordering trial on existence of arbitration agreement).

1 that Amazon improperly monitored his conversations with other drivers in a Facebook group, in
 2 violation of federal privacy statutes. *Id.* at 1096. Amazon moved to compel arbitration based on
 3 the employment agreement that the plaintiff had signed, which covered “any dispute or claim . . .
 4 arising out of or relating in any way to this Agreement, including . . . participation in the program
 5 or . . . performance of services.” *Id.* The court held that the plaintiff’s allegations did not “touch
 6 matters covered by that arbitration clause” because Amazon’s alleged surveillance had no “direct
 7 relationship” to his employment or his employment contract. *Id.* at 1101–04. That disconnect—
 8 between an employment agreement and unrelated privacy claims—simply does not exist here.
 9 Here, Plaintiff’s claims relate to information collected about him on the Keeps website during his
 10 use of the Keeps website, which plainly arise out of and relate to his use of the Keeps website.

11 Finally, to the extent Plaintiff is arguing that arbitration agreements cannot cover statutory
 12 and other noncontractual claims because those claims can never have a “direct relationship” with
 13 the underlying contract, that argument is a dead letter. *See Mitsubishi Motors*, 473 U.S. at 626
 14 (holding that statutory claims that exist independent of a contract are arbitrable under the FAA).

15 **C. Plaintiff’s remaining arguments against equitable estoppel are legally flawed.**

16 Plaintiff does not dispute that equitable estoppel exists to prohibit a plaintiff’s “attempts to
 17 avoid arbitration by suing nonsignatory defendants for claims that are based on the same facts and
 18 are inherently inseparable from arbitrable claims against signatory defendants.” *See Franklin*, 998
 19 F.3d at 870. He also does not dispute that the policy considerations underlying the doctrine are
 20 heightened when a nonsignatory plaintiff simultaneously seeks to avoid both a class action waiver
 21 and substantive choice-of-law provision that would otherwise prohibit his claims in arbitration
 22 against the unnamed signatory. And he does not dispute that this is precisely the unfair litigation
 23 tactic he has employed by suing Twilio in this lawsuit instead of Keeps, the unnamed signatory.

24 The only remaining issue is whether one of the two circumstances warranting equitable
 25 estoppel is present in this case. Both of those circumstances are present here: (1) Plaintiff’s
 26 claims against Twilio are “intimately founded in and intertwined with” the Keeps Privacy Policy;
 27 and (2) the complaint “alleges substantially interdependent and concerted misconduct” between
 28 Keeps and Twilio. *See Herrera*, 104 F.4th at 708–10 (citing *Goldman*, 173 Cal. App. 4th at 221).

1 **1. Plaintiff’s claims are intimately intertwined with the Keeps Privacy**
 2 **Policy, which are incorporated by reference into the Keeps Terms.**

3 Plaintiff does not dispute the core reason why the first circumstance of equitable estoppel
 4 exists here. Plaintiff’s privacy claims require him to plead and prove to the factfinder that he did
 5 not authorize or consent to the data practices that he challenges. MTCA at 9–10. To resolve that
 6 issue, the factfinder will unquestionably have to interpret the Keeps Privacy Policy because that
 7 document defines the privacy rights and obligations of the parties. *Id.* at 10–11. Thus, Plaintiff’s
 8 privacy claims are “bound up with” the Keeps Privacy Policy. *Id.* at 11–13. Because Plaintiff
 9 cannot truly dispute this reality, he picks around the edges of Twilio’s motion with a handful of
 10 half-baked legal arguments and unhelpful citations. None are sufficient to defeat arbitration.

11 **a. The Keeps Terms validly incorporate the Keeps Privacy Policy,**
 12 **and thus the documents must be treated as a unified contract.**

13 Plaintiff contends that the first circumstance of equitable estoppel cannot exist in this case
 14 because the Keeps Privacy Policy is not part of the same contract as the Keeps Terms. *Opp.* at 7.
 15 This argument immediately fails because the Keeps Privacy Policy is validly incorporated into the
 16 Keeps Terms by reference. Under California law, a document is incorporated by reference where
 17 (1) “the incorporation is clear and unequivocal,” (2) “the reference [is] called to the attention of
 18 the other party,” and (3) “the terms of the incorporated writing [are] known or easily available to
 19 the contracting parties.” *In re Holl*, 925 F.3d 1076, 1084 (9th Cir. 2019). When these conditions
 20 are satisfied, the documents are “read together as a single document.” *Poublon v. C.H. Robinson*
 21 *Co.*, 846 F.3d 1251, 1269 (9th Cir. 2017).

22 In this case, in the first paragraph of the Keeps Terms, which is entitled “**AGREEMENT,**
 23 **ACKNOWLEDGEMENT, AND ACCEPTANCE OF TERMS,**” Keeps informs its users that
 24 “You agree that information provided by you in connection with our Service shall be governed by
 25 the Privacy Policies, which are incorporated and made a part of these Terms.” Kanig Decl., Ex.
 26 A ¶ 1 (emphasis in original). The first paragraph conspicuously informs users that “[b]y clicking
 27 accept or otherwise using the Service, you acknowledge that you have read, understand, and
 28 accept all conditions contained within these Terms, our Privacy Policy [hyperlink], KMG

1 Medical Groups’ Notice of Privacy Practices [hyperlink], and Hudson NYC Medical’s Notice of
 2 Privacy Practices (collectively, the ‘Privacy Policies’). You agree that information provided by
 3 you in connection with our Service shall be governed by *the Privacy Policies*, which *are hereby*
 4 *incorporated and made a party of these Terms.*” Kanig Decl., Ex. D ¶ 1 (emphasis added). The
 5 terms of the Keeps Privacy Policy are available by an easily accessible, conspicuous hyperlink.

6 Thus, the Keeps Terms validly incorporated by reference the Keeps Privacy Policy. The
 7 Keeps Terms clearly and unequivocally direct the reader to the linked Keeps Privacy Policy, this
 8 is done in the first paragraph which conspicuously alerts the user to the nature of its contents, and
 9 the terms of the Privacy Policy are easily known because a user need only click on the hyperlink
 10 or visit the Keeps website to view them in their entirety. Accordingly, the Keeps Terms and
 11 Keeps Privacy Policy are treated as a single, enforceable contract, and Plaintiff’s argument fails.

12 **b. Plaintiff does not dispute that his claims hinge on the Keeps**
 13 **Privacy Policy, but argues for an incorrect legal standard.**

14 Plaintiff’s only other argument is that his privacy claims are not sufficiently intertwined
 15 with the Keeps Privacy Policy because his complaint does not expressly cite and rely upon it to
 16 state his claims. Opp. at 8–9. But the Ninth Circuit has squarely rejected this argument. “It is
 17 the substance of the plaintiff’s claim that counts, not the form of its pleading.” *Franklin*, 998
 18 F.3d at 875. Thus, even in cases where “[the plaintiff] omits any mention of [the other signatory]
 19 from [the] complaint,” the plaintiff’s claims are still “intimately founded in and intertwined with”
 20 their contract where “the substance of [the plaintiff’s] claims is rooted in” and “cannot be
 21 answered without reference to [their contract].” *Id.* at 875–76; *see also Herrera*, 104 F.4th at 710
 22 (sufficient intertwinement exists where allegations “are in *any way* founded in or bound up with
 23 the terms or obligations in the operating agreement”) (quoting *Goldman*, 173 Cal. App. 4th at
 24 230). Here, Plaintiff does not dispute that his claims require him to plead and prove he did not
 25 authorize or consent to Keeps’s collection and sharing of his personal health information with
 26 third-party service providers like Twilio. Compl. ¶¶ 3–6 (generally), ¶ 76 (CIPA § 631 claims), ¶
 27 86 (CIPA § 632 claim), ¶ 89 (constitutional and common law invasion-of-privacy claims). Thus,
 28 the fact that Plaintiff studiously avoided alerting this Court to the document that his claims turn

1 upon is not the successful defense to equitable estoppel that Plaintiff seems to think that it is.

2 Plaintiff's district court authorities do not help him overcome this precedent. Indeed, his
 3 primary authority, *Smith v. Google LLC*, is easily set aside for failing to follow the Ninth Circuit's
 4 holding in *Franklin*. See No. — F. Supp. 3d —, 2024 WL 1171653 (N.D. Cal. Mar. 19, 2024).
 5 *Smith*'s first clear legal error was rejecting the possibility that statutory claims can be subject to
 6 equitable estoppel unless they “rel[y] directly on the terms of [the contract.]” *Id.* at *3. But the
 7 Ninth Circuit had rejected this precise argument in *Franklin* several years earlier. 998 F.3d at 872
 8 (affirming order compelling arbitration on equitable estoppel grounds of statutory wage-and-hour
 9 claims not predicated on the enforcement of the terms of the underlying employment agreement)
 10 (discussing *Garcia v. Pexco, LLC*, 11 Cal. App. 5th 782 (2017)). Indeed, the *Smith* court itself
 11 completely changed course and reached the correct conclusion a few months later in the related
 12 case of *Hunt v. Meta Platforms*. See — F. Supp. 3d —, 2024 WL 2503118, at *2–3 (N.D. Cal.
 13 May 24, 2024) (compelling arbitration of statutory claim on equitable estoppel grounds).

14 *Smith*'s second clear legal error was holding that the California Invasion of Privacy Act
 15 (“CIPA”) claims did not require interpretation of the unnamed signatory's privacy policy to
 16 determine whether there was authorization or consent. See 2024 WL 1171653, at *3. Instead,
 17 without citation to any authority, the court held that consent was an affirmative defense and thus
 18 intertwinement with the plaintiff's claims was impossible. *Id.* But each of Plaintiff's invasion-
 19 of-privacy claims require him to plead a lack of authorization or consent, MTCA at 9–10, and
 20 Plaintiff does not contest that this is a claim element. In any case, what ultimately matters is “the
 21 substance of the plaintiff's claim,” which is why courts look to “the relationships of persons,
 22 wrongs and issues” alleged in the complaint, regardless of whether the plaintiff references the
 23 underlying contract with the arbitration agreement. *Franklin*, 998 F.3d at 871, 875. Under that
 24 framework, Plaintiff's claims cannot be answered without reference to the Keeps Privacy Policy.

25 Plaintiff's only other relevant authority—*Ellington v. Eclipse Recreational Vehicles*—is
 26 inapposite. See No. 21–55021, 2022 WL 72351, at *1 (9th Cir. Jan. 7, 2022). There, the
 27 plaintiff's implied warranty claim by definition did not depend on the terms of the underlying
 28 purchase contract; they were implied. *Id.* That, of course, is not the case here. Plaintiff's claims

1 hinge on the Keeps Privacy Policy, which are express terms to which he and Keeps agreed.

2 **2. Plaintiff barely disputes that his privacy claims against Twilio are**
 3 **predicated on interdependent misconduct between Twilio and Keeps.**

4 Finally, Plaintiff does not meaningfully contest that he alleges “concerted misconduct”
 5 between Keeps and Twilio that cannot be resolved without reference to Keeps’s contract with
 6 Plaintiff. MTCA at 13–15 (citing *Herrera*, 104 F.4th at 711; *Hunt*, 2024 WL 2503118, at *3).
 7 Nor can he. The core theory of his case is that Keeps colluded with Twilio to secretly collect and
 8 use Keeps customer information for their mutual profit, and his complaint is thus replete with
 9 allegations of this kind of collusive conduct between Keeps and Twilio. Compl. ¶¶ 3 (alleging
 10 contractual agreement between Twilio and Keeps that “enabled” them to enact their alleged data-
 11 collection scheme); *id.* ¶¶ 27–51 (alleging deployment of this joint scheme); *id.* ¶ 56 (alleging that
 12 “the agreement for [Twilio] to wiretap [Keeps’s customers’] communications on the [Keeps]
 13 Website is done for the purpose of improperly increasing the advertising efficacy and, by
 14 extension, profits of both parties”). Plaintiff does not even try to distinguish Twilio’s authorities.

15 Instead, Plaintiff again relies on *Smith v. Google* to support his argument, but again this
 16 reliance is misguided. *See* Opp. at 10–11 (citing 2024 WL 1171653, at *3). In *Smith*, the court
 17 held that there were insufficient allegations of collusion to warrant equitable estoppel because the
 18 plaintiffs “do not allege that Google instructed the Websites to transmit to Google the purported
 19 financial data” or that the software provider had acted any “differently from how it interacted
 20 with any other user of its off-the-shelf tracking tools.” *Smith*, 2024 WL 1171653, at *3. Those
 21 are not the facts here. Plaintiff alleges that Twilio and Keeps contracted for Twilio to provide
 22 Keeps with its Segment software so that the parties could mutually benefit by improperly sharing
 23 Keeps customer data. Compl. ¶ 56. In any case, the *Smith* court ultimately recanted its logic in
 24 the related case of *Hunt v. Meta Platforms*, finding there were likely sufficient allegations of
 25 collusion to warrant the application of equitable estoppel. *See* 2024 WL 2503118, at *3. Thus,
 26 the only basis on which Plaintiff opposes this second application of equitable estoppel is illusory.

27 **III. CONCLUSION**

28 This Court should compel Plaintiff’s claims to individual arbitration and stay this case.

1 Dated: October 10, 2024

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